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## Protection of Public Trust Assets: Trustees’ Duty of Loyalty in the Context of Modern American Politics

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The debate over the climate change crisis is no longer about whether global warming is fact or fiction, rather it is about how and when to address the effects of climate change. Scientists agree that global warming is negatively impacting the Earth’s water supply, wildlife habitats, coastal communities, air and water quality, biodiversity, and forests, among others. Leading scientists indicate that the time frame for action is as short as ten years.<sup>1</sup> Consequently, *now* is the time to act; the problem cannot be solved with individual voluntary action. If the Earth is to stand a chance, governments across the globe must force changes

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<sup>1</sup> Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243, 246 n.16 (2007).

in human behavior immediately.<sup>2</sup> Specifically, public officials in the United States need to make climate change a top priority—something that they have collectively failed to do up to this point. Inaction by public officials in the United States is resulting in deterioration of public trust assets in which public officials have a duty as trustees to protect. Public officials must be held liable for disregarding and neglecting this duty if we are going to get their attention. Because of the political system in the United States, public officials acting as trustees of the public trust are ignoring their duties of loyalty to the public trust beneficiaries and are intertwined in personal and political conflicts of interest that are incongruous with their trust duties. Something must be done to force government to address this critical matter.

Parts I and II of this Article provide an overview of the climate change crisis and the public trust doctrine. Part III discusses trusts generally and the difference between private and public trusts. Part IV discusses the duties owed by the trustee to the trust beneficiaries; specifically, the trustee's duty of loyalty and the several sources from which the duty is derived. Part V takes an in-depth look at the types of conflicts of interest confronted by trustees and trustees' agents in their administrative capacity. Recent examples from federal agencies are provided to demonstrate how conflicts of interests influence decisions that impact the public trust. Finally, Part VI ties the trust principles, trust duties, and trustee conflicts of interest together and suggests future actions to attract the trustee's attention.

## I THE CLIMATE CHANGE CRISIS

The documented rise in the Earth's temperature, commonly known as global warming, has resulted in global climate change.<sup>3</sup> The Earth's increased temperature is the result of an increase in

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<sup>2</sup> See Doug Struck, *U.N. Global Warming Report Sternly Warns Against Inaction*, WASH. POST, Nov. 17, 2007, at A3.

<sup>3</sup> For a complete explanation of global warming dynamics, see Global Warming FAQ, Union of Concerned Scientists, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/science](http://www.ucsusa.org/global_warming/science_and_impacts/science) (follow "Global Warming FAQ" hyperlink) (last visited Jan. 7, 2009).

heat-trapping gases in the Earth's atmosphere.<sup>4</sup> Until now, the greenhouse effect naturally kept the atmosphere within a temperature range that allowed life to exist on Earth.<sup>5</sup> The greenhouse effect occurs when the sun's energy warms the Earth's surface and atmosphere.<sup>6</sup> This heat then radiates back toward space and a portion is absorbed by heat-trapping gases in the atmosphere, specifically carbon dioxide and methane.<sup>7</sup> This greenhouse effect creates an insulating layer in the Earth's atmosphere that acts like a temperature control, keeping the Earth at an average surface temperature of fifty-nine degrees Fahrenheit.<sup>8</sup> Without the temperature-regulating greenhouse effect, the Earth would have an average temperature of zero degrees Fahrenheit, a temperature much too low to sustain life.<sup>9</sup>

Scientists around the world have concluded that human activities, such as driving cars, utilizing coal-fired power plants, engaging in deforestation, and raising cattle are significantly contributing to global warming.<sup>10</sup> This is because these and other activities emit large amounts of heat-trapping gases into the atmosphere.<sup>11</sup> Since the Industrial Revolution, humans have burned massive quantities of fossil fuels and in doing so have emitted so many greenhouse gases that it has changed the composition of the Earth's atmosphere.<sup>12</sup> During this period, the atmospheric concentration of carbon dioxide has increased by 31 percent and methane has increased by 151 percent.<sup>13</sup> As increased greenhouse gases are emitted into the atmosphere, the concentration of these gases increases; thus, less heat escapes and more heat is trapped on Earth.<sup>14</sup> This increase in

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577, 578 (2007).

<sup>13</sup> Global Warming FAQ, *supra* note 3.

<sup>14</sup> *Id.*

greenhouse gas concentration levels has affected and altered weather patterns all over the world.<sup>15</sup>

The effects of changing weather patterns impact natural habitats needed for life to survive. For instance, the polar ice cap in Greenland and glaciers worldwide are melting, which is negatively impacting native people and wildlife and literally sinking beachfronts and coastal communities.<sup>16</sup> Scientists predict that global warming will result in the loss of crops, shortages of food, and loss of coastlines, as well as drought, wildfires, increased severity of hurricanes and tornadoes, heat waves, landslides, vanishing snowpack, and species extinctions.<sup>17</sup>

So what does this information tell us about the condition of the Earth's climate today? It tells us we are facing a grave problem and action must be taken now. Jim Hansen, the leading climate scientist for NASA, warned in 2006 that we have ten years at most, "not ten years to decide upon action, but ten years to alter fundamentally the trajectory of global greenhouse emissions."<sup>18</sup> Hansen continues to argue that we are nearing a "tipping point."<sup>19</sup> The tipping point is the point at which carbon levels reach such a height that successive actions to reduce carbon emissions will not prevent long-term disaster from occurring.<sup>20</sup> Specifically, the climbing trajectory of greenhouse gas emissions must be reversed within the next ten years, and we must reduce global greenhouse gas emissions to below eighty percent of 1990 levels by 2050.<sup>21</sup> The United States is one of the largest producers of carbon emissions in the world;<sup>22</sup> thus, it must

<sup>15</sup> *Id.*

<sup>16</sup> See generally U.N. FOUNDATION & SIGMA XI, CONFRONTING CLIMATE CHANGE: AVOIDING THE UNMANAGEABLE AND MANAGING THE UNAVOIDABLE 19 (2007), available at [http://www.globalproblems-globalsolutions-files.org/unf\\_website/PDF/climate%20change\\_avoid\\_unmanagable\\_manage\\_unavoidable.pdf](http://www.globalproblems-globalsolutions-files.org/unf_website/PDF/climate%20change_avoid_unmanagable_manage_unavoidable.pdf).

<sup>17</sup> Wood, *supra* note 12 at 581–82; see also Global Warming FAQ, *supra* note 3.

<sup>18</sup> Jim Hansen, *The Threat to the Planet*, N.Y. REV. OF BOOKS, July 13, 2006, at 12, 16.

<sup>19</sup> *Id.*

<sup>20</sup> Wood, *supra* note 12, at 586.

<sup>21</sup> Hansen, *supra* note 18; see also, NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW 223 (2006).

<sup>22</sup> Each Country's Share of Global CO<sub>2</sub> Emissions, Union of Concerned Scientists, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/science](http://www.ucsusa.org/global_warming/science_and_impacts/science) (last visited Jan. 7, 2009) (follow "Each Country's Share of CO<sub>2</sub> Emissions" hyperlink under "Tools & Resources").

act now through all levels of government to help prevent reaching the tipping point.

## II

### CLIMATE CHANGE AND THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a common law doctrine that holds some natural resources in trust to be protected by the sovereign, the governing body, for future generations.<sup>23</sup> In 1845, the U.S. Supreme Court held in *Pollard v. Hagan* that the states owned streambeds within their borders and that it was critical that states retained ownership because those lands supported fishing, navigation, and commerce—activities important to the functioning of society.<sup>24</sup>

The early key case defining the public trust doctrine is *Illinois Central Railroad Co. v. Illinois*. The U.S. Supreme Court held that an implied public trust came with submersible lands along navigable waterways so that the people of the state could engage in navigation, commerce, and fishing within the waterways.<sup>25</sup> Additionally, the Court held that states could convey the submersible lands to private parties; however, the land carried with it a public trust duty to not substantially impair the public trust interest.<sup>26</sup> Thus, the duty restricts the property owner's use of the land.<sup>27</sup> The Court explained that “[t]he control of the state for the purposes of the trust can never be lost.”<sup>28</sup> Therefore, private property owners who acquire title to public trust lands will never acquire full title.<sup>29</sup> Consequently, the public trust doctrine allows the state to force reacquisition of the lands without having to compensate the property owner because the property owner never had full title in ownership.<sup>30</sup>

Public trust assets have expanded over time to include more than navigable waterways. Public trust assets now include

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<sup>23</sup> JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 622 (2006).

<sup>24</sup> *Pollard v. Hagan*, 44 U.S. 212, 215, 229 (1845).

<sup>25</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452–53 (1892).

<sup>26</sup> *Id.* at 453.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 455.

wetlands, lakes, parks, trees, beaches, and wildlife.<sup>31</sup> Because the climate change crisis has a direct impact on these public trust assets, the climate change crisis needs to and should be addressed from the public trust context. If the public trust doctrine is going to operate as a trust—for the protection of natural resources for future generations—then the sovereign has an explicit duty to protect trust assets from damage and depletion resulting from the climate change crisis. The sovereign trustees must act to defend the trust against injury, and where the trust is damaged, the trustee must restore the trust assets.<sup>32</sup> It is this duty held by the sovereign that links together the climate change crisis and the public trust doctrine.

### III TRUSTS 101

To better understand the public trust doctrine, one must know what a trust is, how private and public trusts differ, and the duties encumbered in a trust. Generally, a trust creates a fiduciary relationship where a trustee holds title to the property of another for the benefit of the beneficiary.<sup>33</sup> The two primary types of trusts are private trusts and charitable trusts.<sup>34</sup> For the purpose of this discussion, private trusts are emphasized.

Private trust elements include: (1) an asset placed into trust (2) with a trustee who takes possession of the assets (3) for the purpose of protecting the assets against loss or damage and (4) maximizing the productivity of the assets.<sup>35</sup> Private trustees have several fiduciary duties to the beneficiaries of the trust. Trustees' duties include but are not limited to the following: administer the trust, afford loyalty to the beneficiary of the trust, refrain from delegating the trust, communicate and provide information about the trust, act only in the best interest of the trust beneficiary, exercise reasonable care and skill, preserve

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<sup>31</sup> LAITOS ET AL., *supra* note 23, at 349.

<sup>32</sup> Wood, *supra* note 1, at 262.

<sup>33</sup> Sally K. Fairfax & Andrea Issod, *Trust Principles as a Tool for Grazing Reform: Learning from Four State Cases*, 33 ENVTL. L. 341, 347 (2003); *see also* BLACK'S LAW DICTIONARY 1546 (8th ed. 2004).

<sup>34</sup> BLACK'S LAW DICTIONARY, *supra* note 33, at 1546.

<sup>35</sup> Daniel P. Kapsak, *Cause of Action Against Trustee Management of Trust Assets*, in 21 CAUSES OF ACTION 575, § 1 (2007); *see also* RESTATEMENT (SECOND) OF TRUSTS § 174 (2005).

property, make trust property productive, pay income to the beneficiary, and deal impartially with the beneficiary.<sup>36</sup>

Several private trust elements and fiduciary duties are present in a public trust. Like a private trust, a public trust has assets that are placed in the possession of another (government) for the purpose of protecting those assets and maximizing their productivity. Thus, the public trust doctrine places assets (natural resources) in the hands of the trustee (the sovereign at all government levels) to protect against loss and maximize trust productivity for future use by the beneficiaries (generations to come). Also as in a private trust, several fiduciary duties are encumbered in the public trust structure. Specifically, in a public trust, the trustee has a duty to protect and preserve the asset, a duty to protect the asset from waste, and a duty of loyalty to the beneficiaries.<sup>37</sup> Other duties borrowed from the private trust structure include the duty to provide information about trust actions and the trust's status to the beneficiaries (communication and disclosure)<sup>38</sup> and a duty to act prudently when deciding if and how to delegate trustee authority.<sup>39</sup>

#### IV

##### TRUSTEE DUTIES AND THE PUBLIC TRUST

A trustee's duty of loyalty is a heavy-weighted fiduciary duty that requires a trustee to act and operate in a manner with the utmost loyalty to the trust beneficiaries.<sup>40</sup> In essence, the duty of loyalty encompasses all other trustee duties, requiring the trustee to make all trust decisions based on what is in the best interest of the beneficiaries and, ultimately, the trust assets. The trustee's duty of loyalty is derived from constitutions, common law, oaths of office, statutes, and regulations.

Almost all states, through constitutions and judicial opinions, require government management of natural resources for the benefit of the public.<sup>41</sup> In so doing, many states have imposed

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<sup>36</sup> RESTATEMENT (SECOND) OF TRUSTS §§ 169–183.

<sup>37</sup> LAITOS ET AL., *supra* note 23, at 623.

<sup>38</sup> 76 AM. JUR. 2D *Trusts* § 356 (2005).

<sup>39</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892); Kapsak, *supra* note 35, at § 2.

<sup>40</sup> RESTATEMENT (SECOND) OF TRUSTS § 174.

<sup>41</sup> LAITOS ET AL., *supra* note 23, at 349.

upon the government an implied or express duty of loyalty in the management of the public trust.<sup>42</sup> For example, the Rhode Island State Constitution states:

[I]t shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.<sup>43</sup>

The public trust doctrine and the duties encumbered by the sovereign trustees are historically rooted in common law. In addition to *Illinois Central*, there are copious state judicial opinions that echo the philosophies in the Rhode Island State Constitution pertaining to the trust and the trustee's duties.<sup>44</sup>

In an 1896 U.S. Supreme Court decision, Justice White wrote:

[T]he power or control lodged in the state, resulting from this common ownership [of natural resources], is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government . . . or for the benefit of private individuals as distinguished from the public good.

. . . [T]he ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.<sup>45</sup>

<sup>42</sup> See CAL. CONST. art. X, § 4; see also HAW. CONST. art. XI, § 1; ILL. CONST. art. XI, § 1; OR. CONST. art. VIII, § 5; PA. CONST. art. I, § 27.

<sup>43</sup> R.I. CONST. art. I, § 17; see also Thomas R. Bender, *Legislative Control Over the Coastal Resources Management Council After Separation of Powers*, 12 ROGER WILLIAMS U. L. REV. 314, 321–22 (2007).

<sup>44</sup> See, e.g., *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991); *Orion Corp. v. State*, 747 P.2d 1062 (Wash. Ct. App. 1987); *Priewe v. Wis. State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896). For a complete discussion of these cases and others, see LAITOS ET AL., *supra* note 23, at 623 (stating that there are now over one hundred cases interpreting the public trust doctrine on the state level).

<sup>45</sup> *Geer v. Connecticut*, 161 U.S. 519, 529, 534 (1896).



Without using the term “duty of loyalty,” Justice White described the duty of loyalty that the state must embrace as the trustee.

The duty of loyalty as related to the public trust has even older roots than late nineteenth-century legal cases; it was found throughout Native American culture and governance long before Anglo-Saxons settled in North America.<sup>46</sup> As Professor Mary Wood has said: “The very core of [Indian] governmental responsibility was preserving resources for future generations . . . [as] both a religious principle and a principle of governance.”<sup>47</sup> Tribal leaders were custodians of the tribe’s natural resources; thus, they had an inherent duty to protect and preserve the natural resources for future generations.<sup>48</sup>

The sovereign’s duty of loyalty is often promised to its people when individual public officials take an oath of office. An oath is a legally binding pledge and is “reserved for human activities of the highest order.”<sup>49</sup> The U.S. Constitution prescribes certain oath requirements for the president, U.S. senators and representatives, members of state legislatures, and federal and state executive and judicial officers.<sup>50</sup> The presidential oath is specified in Article II, Section 1, Clause 8 and provides: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”<sup>51</sup> The phrases “best of my Ability” and “preserve, protect and defend the Constitution” equate to a promise of loyalty to serve the people. Additionally, state and local government employees often have to take an oath of office

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<sup>46</sup> Wood, *supra* note 1, at 265; *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 *passim* (1994).

<sup>47</sup> Wood, *supra* note 1, at 265.

<sup>48</sup> *Id.* (stating that tribal leaders were “stewards of the plants, the animals, the waters, and the air”).

<sup>49</sup> JOHN A. ROHR, PUBLIC SERVICE, ETHICS AND CONSTITUTIONAL PRACTICE 70–71 (1998).

<sup>50</sup> U.S. CONST. art. II, § 1, cl. 8 (requiring a presidential oath of office); U.S. CONST. art. VI, cl. 3 (requiring an oath of office for U.S. senators, U.S. representatives, state legislators, and executive and judicial officers); 5 U.S.C. § 3331 (2006) (spelling out the oath of office for civil or military servicemembers).

<sup>51</sup> U.S. CONST. art. II, § 1, cl. 8.

that is typically prescribed in state constitutions and statutes.<sup>52</sup> Many oaths include not only a clause to uphold the Constitution but also a clause to uphold the laws of the state and/or local ordinances.<sup>53</sup> In sum, when taking an oath of office, a public official expresses a promise of loyalty to the people and to uphold, preserve, and protect the laws of the jurisdiction.

Promises made when taking an oath of office are directly related to public trust principles in a few ways. First, although not expressly stated in the Constitution, the public trust doctrine is implied in the Constitution, through the equal footing doctrine, navigational servitude doctrine, and the Commerce Clause.<sup>54</sup> Consequently, when a public official promises to uphold the Constitution to the best of her ability and to protect, preserve, and defend the Constitution, the public official is promising to protect, preserve, and defend the public trust as an aspect of American constitutional law. Consequently, every time a public official acts with disloyalty toward the public by damaging the public trust, the public official is breaking her promise.

Another source for the duty of loyalty is the public duty doctrine borrowed from tort law. The public duty doctrine provides that a government entity cannot be held liable for harm caused to an individual resulting from a government official or employee's breach of duty owed to the public.<sup>55</sup> In essence, where the governing body has a duty to the public at large, the state is immune from liability to individual plaintiffs.<sup>56</sup> If a duty is not established constitutionally or statutorily, a duty can be established under the public duty doctrine in two ways: (1) affirmative conduct by the governing body or (2) when the governing body does not perform a required act.<sup>57</sup>

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<sup>52</sup> ROHR, *supra* note 49, at 69; 63C AM. JUR. 2D *Public Officers & Employees* § 124 (1997).

<sup>53</sup> See 63C Am. Jur. 2d *Public Officers and Employees* § 124.

<sup>54</sup> Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 425, 429–31, 441 (1989); see also Gregory A. Thomas, *Conserving Aquatic Biodiversity: A Critical Comparison of Legal Tools for Augmenting Streamflows in California*, 15 STAN. ENVTL. L.J. 3, 35 (1996).

<sup>55</sup> BLACK'S LAW DICTIONARY, *supra* note 33, at 1265.

<sup>56</sup> Karen L. Golan, *Court Reports*, 6 U. DENV. WATER L. REV. 581, 645 (2003).

<sup>57</sup> Jason E. McCollough, Note, *State Tort Liability for Failure to Protect Against Bioterrorism*, 8 DRAKE J. AGRIC. L. 743, 770 (2003).

Two key points demonstrate the differences and similarities between the doctrines of public trust and public duty. First, the public duty doctrine offers immunity to the governing body if an *individual* is harmed as a result of government negligence. However, in the public trust scenario, *everybody*, meaning the public at large, is harmed.

Second, a public duty can be established by either government action or inaction under the public duty doctrine.<sup>58</sup> Thus, a government official can be held liable under the public duty doctrine for failing to take action. Similarly, public trust assets and beneficiaries are harmed by government action and inaction. For instance, the salmon population in the Pacific Northwest has been greatly harmed by government *action* permitting activities that are known to be harmful to the fish.<sup>59</sup> On the other hand, the nation's air continues to become so polluted that it is toxic to humans and animals due to government *inaction* to force higher standards and cleaner technology.<sup>60</sup>

In sum, the public duty doctrine provides a framework for assigning the government's duty of loyalty to the public trust. As discussed, many sources impose a duty of loyalty on public trust trustees: historical common law, Indian culture and governance, oaths of office, and the public duty doctrine. Consequently, there should be no doubt that the duty of loyalty is an integral part of the trustee's duties to protect the public trust.

## V

### TRUSTEE CONFLICTS OF INTEREST

Because of the trustee's duty of loyalty, the trustee must act only in the best interest of the beneficiaries in administering the trust. In other words, all decisions and actions affecting the trust must be made for the purpose of protecting, preserving, defending, and increasing the trust's productivity. That idea seems straightforward, but in the context of the public trust, the situation is much more complex because the trustees are public officials operating in a political world that is further complicated by U.S. administrative law. Under the modern political

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<sup>58</sup> *Id.*

<sup>59</sup> *E.g.*, Wood, *supra* note 1, at 266–67.

<sup>60</sup> *See* California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (order granting defendant-polluter's motion to dismiss).

structure, it is both ironic and puzzling that the sovereign, which holds our fragile natural resources in trust, is comprised of individuals who are also active players in the game of politics. Thus, we have appointed trustees that are entrenched in personal and political conflicts of competing interests. To better understand this dynamic, it is necessary to examine self-interest and political-interest conflicts, as well as the conflicts that arise in the present political and administrative structure.

When a public official takes office, the official assumes a fiduciary duty that requires the official to act in the best interest of the public.<sup>61</sup> A conflict of interest develops when the official has personal interests that are contrary to the official's public duties and interests.<sup>62</sup> However, public officials are charged with the development of policy, and policy development involves political bargaining and positioning, which is typically driven by personal and political interests. Thus, there are two types of conflicts that confront a public official: personal and political. The tricky task is determining where a personal conflict of interest begins and a political one ends. There are often no clear lines because these types of conflicts are often entangled with one another.

It is a clearly defined rule that if there is potential for a trustee to act in his or her own self-interest or in conflict with the interests of the trust, the trustee may be held liable for breaching his or her duty to the trust.<sup>63</sup> Additionally, courts have held that a public officer's official actions must remain uninfluenced by a private motive or interest.<sup>64</sup> This idea is particularly critical in a public trust context if the purpose of the trust is to be served. Nonetheless, public officials make decisions everyday that are counter to public trust principles due to conflicts of interest—yet, public officials are not held accountable. Is this because we have come to accept that our trustees are politicians and politics trump trust duties? Or is it because as citizens we have become

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<sup>61</sup> Debra S. Weisberg, Note, *Eliminating Corruption in Local Government*, 17 SETON HALL LEGIS. J. 303, 305 (1993).

<sup>62</sup> *Id.* at 304.

<sup>63</sup> Kapsak, *supra* note 35, at § 2; *see also* Jefferson Nat'l Bank v. Cent. Nat'l Bank, 700 F.2d 1143, 1152 (7th Cir. 1983).

<sup>64</sup> *E.g.*, S & L Assocs. v. Township of Wash., 160 A.2d 635, 644 (N.J. Super. Ct. App. Div. 1960); *see also* Weisberg, *supra* note 61, at 305.

apathetic to government and no longer demand accountability as we once did?

Conflicts of interest are profuse at the administrative level of government as well. This is partly because in a public trust context, public administrators are agents of the trustees.<sup>65</sup> In a private trust, trustees have no power to delegate the duties of the trust that require judgment and discretion.<sup>66</sup> This is impractical in the public trust context because the trust duties apply to all sovereigns at federal, state, and local levels and each level needs administrators and agencies to carry out their policies.<sup>67</sup>

No court has specified that one sovereign or one body of government is responsible for ensuring that trustees properly manage the trust. For instance, the chief executive (either at the state or federal level) is a trustee to the public trust. It is appropriate for the executive branch to make policy addressing issues that require resolution of competing interests because the chief executive is accountable to the people. Knowing that the chief executive cannot undertake all state matters alone, it is appropriate for him to delegate to agencies, including trust responsibilities.

Also, the public trust is similar to the Indian Lands Trust in that the trust preempts all other statutes, thus, acting as a blanket to all sovereign responsibilities affecting the trust.<sup>68</sup> As Professor Mary Wood explained:

Each federal agency is bound by this trust responsibility. Federal agencies must respond to the independent obligations the trust duty forms . . . . [T]his trust responsibility can be thought of as an interstitial body of law that, when applied in

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<sup>65</sup> See Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 743–44 (1995).

<sup>66</sup> *In re Hartzell's Will*, 192 N.E.2d 697, 706 (Ill. App. Ct. 1963); Kapsak, *supra* note 35, at § 2.

<sup>67</sup> See generally *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 79 P.3d 297, 306 (N.M. 2003) (citing *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984)). Similarly, it is entirely appropriate for legislative bodies to make decisions on issues that impact the public trust because it is thought that those decisions closely mirror the public will. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 654 (1986).

<sup>68</sup> See Wood, *supra* note 65, at 743–44.

concert with applicable statutes, imposes on agencies a duty to protect tribal interests in carrying out general statutory mandates. . . . The law is settled that federal agencies cannot abrogate or extinguish the trust relationship, or violate treaty rights, though courts still allow Congress such plenary power.<sup>69</sup>

Consequently, assuming the trustee provides mandates for how the trust activities are to be executed, administrative agencies are authorized to act on behalf of the trustee. Administrative law is premised on the notion that agencies are to carry out their purposes in a neutral manner, while also allowing agencies discretionary authority.<sup>70</sup>

But it is within this administrative discretionary authority that conflicts of interest abound. For example, at the federal level, Congress enacts statutes that give administrative agencies incredible discretionary authority to implement policies and programs. Some argue it is the discretionary authority granted to administrators that does the most damage to public trust assets.<sup>71</sup> The problem with administrative discretion is that administrators are not shielded from political conflicts of interests, even though they were originally intended to be. In fact, it can be argued that administrators are in a worse position than elected officials when it comes to being led by personal and political interests. Whereas elected officials are intended to be checked by the people, administrators are checked by elected officials with whom they may never meet but are frequently reminded for whom they work.

In addition, the public is not likely to hear about what happens at the administrative level. Accordingly, if the elected official is more interested in economic opportunities that will release toxic particles into the air rather than protecting public trust assets, the administrator may find himself influenced by his own personal and political interests. Specifically, the administrator has a personal interest in keeping his job. The administrator knows that if he challenges the elected official's interest in the economic opportunity, it may likely be the end of his career, or he may find his position transferred elsewhere. In

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<sup>69</sup> *Id.*

<sup>70</sup> Wood, *supra* note 1, at 254 (citing David Schoenbrod, *The EPA's Faustian Bargain*, REGULATION, Fall 2006, at 39, available at <http://www.cato.org/pubs/regulation/regv29n3/v29n3-5.pdf>).

<sup>71</sup> *See id.* at 252.

essence, this administrator gives little (if any) consideration to the public trust because it appears removed, whereas his livelihood and career are right in front of him. Therefore, agency decision making is often guided not by legislative mandates but by a fear of personal losses.<sup>72</sup>

The argument is not that administrators and agency staff do not want to protect trust assets; it is likely that most of them do. The problem is that administrators and agency staff are well aware of political realities and of who approves their paychecks. The following examples of administrative conflicts of interests under the Endangered Species Act (ESA) and in the Environmental Protection Agency (EPA) provide illustrations.

Congress adopted the ESA in 1973 for the purpose of identifying, protecting, and rehabilitating species that were in danger of extinction.<sup>73</sup> The ESA established the “jeopardy standard,” which allows federal officials to assess whether proposed or existing actions adversely impact species listed as “endangered” under the ESA.<sup>74</sup> The ESA prescribes a mandatory consultation process where the jeopardy standard is the only tool for determining the legality of federal actions that affect listed species.<sup>75</sup> The U.S. Fish and Wildlife Service (FWS) administers the ESA in conjunction with the National Marine Fisheries Service (NMFS).<sup>76</sup> The problem with administrative enforcement of the ESA is that Congress refrained from defining the jeopardy standard, so it is left up to the discretion of the FWS and NMFS to interpret and apply the standard.<sup>77</sup> Therefore, FWS and NMFS must determine if an activity will jeopardize a listed species and, ultimately, if the activity may begin or continue.

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<sup>72</sup> *Id.* at 257 (quoting Zach Welcker, Cultivating Corridors for the People: The Next Twenty-Five Years, Welcome Speech at the University of Oregon School of Law Public Interest Environmental Law Conference (Mar. 1, 2007), in 22 J. ENVTL. L. & LITIG. 197, 198 (2007)).

<sup>73</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 (2006); see Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 WASHBURN L.J. 114, 114–15 (2001).

<sup>74</sup> Rohlf, *supra* note 73, at 114.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Daniel J. Rohlf, a law professor at Lewis and Clark College, argues that the ESA's jeopardy standard fails to provide "workable protections" for listed species for several reasons, including a lack of biological standards and conflicting scales of analysis.<sup>78</sup> Without these guidelines, Rohlf argues, agencies administering the ESA are able to employ large amounts of "unfettered discretion."<sup>79</sup> The result of this unfettered discretion is a constantly evolving definition of the jeopardy standard, which swings with shifts in politics, and rare occurrences where a jeopardy opinion stops activities that are known to be endangering listed species.<sup>80</sup> A FWS study over a six-year period found that the Agency issued only 150 jeopardy biological opinions out of 2719 formal consultations and 94,113 informal consultations.<sup>81</sup> Furthermore, the Agency found only fifty-four activities that jeopardized a listed species.<sup>82</sup>

Applying this example to the public trust (wildlife is a public trust asset), it is quite clear by the numbers alone that agency discretion resulted in harm to trust assets more often than not. Rohlf discussed the competing economic interests that were present during the six-year period of the study, and he concluded that the economic interests almost always won.<sup>83</sup> Although economic interests are often termed "competing" interests, in the case of the public trust the accurate term is "conflicting interests."

In another and more recent example involving the ESA, the Inspector General and the Government Accountability Office (GAO) found that a former deputy assistant secretary of the FWS used improper political and personal influences to limit protections to endangered and threatened species.<sup>84</sup> It was determined that eight decisions by the former deputy required further review by the FWS because improper influences may

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<sup>78</sup> *Id.* at 163.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 162–63.

<sup>81</sup> *Id.* at 151 n.153.

<sup>82</sup> *Id.*

<sup>83</sup> *See generally id.*

<sup>84</sup> U.S. GEN. ACCOUNTING OFFICE, U.S. FISH AND WILDLIFE SERVICE: ENDANGERED SPECIES ACT DECISION MAKING, 6–8 (2008), *available at* <http://www.gao.gov/new.items/d08688t.pdf>.



have compromised the scientific bases of those decisions and had a potentially negative impact on the affected species.<sup>85</sup> The deputy has since resigned as a result of congressional investigations and criticism, but, unfortunately, the resignation came too late to prevent further harm caused to the species affected by the eight improper decisions.<sup>86</sup>

The public trust blankets all federal law; therefore, it is intended to preempt all other actions that conflict with the trust's interests. So why do we allow public agencies, under legislative mandates, to harm trust assets repeatedly and not even suggest liability? The next example may help answer this question.

The EPA is the only federal agency with the authority to regulate carbon dioxide emissions.<sup>87</sup> The EPA has the authority to grant or deny permits for an activity based on the type and amount of toxic pollutants the polluter will release into the air.<sup>88</sup> Despite being charged with protecting air quality, the EPA continues to grant permits for activities that it knows will release toxins into the air.<sup>89</sup>

The Commonwealth of Massachusetts sued the EPA for not regulating greenhouse gases from new automobiles under the Clean Air Act (CAA).<sup>90</sup> The D.C. Circuit Court held that the EPA had the discretion to decide not to use its authority granted under the CAA to regulate greenhouse gases.<sup>91</sup> The U.S. Supreme Court granted certiorari and found that the EPA's authority to regulate greenhouse gas emissions from new cars was "unambiguous," but the Court also found that the EPA was only responsible for regulating greenhouse gas emissions if the Agency determined that such emissions endangered public health and welfare.<sup>92</sup> The process for that determination was

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<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 6; see also *Congress Investigates MacDonald's Farm*, ENV'T NEWS SERVICE, May 21, 2007, <http://www.ens-newswire.com/ens/may2007/2007-05-21-06.asp>.

<sup>87</sup> Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006).

<sup>88</sup> See generally *id.* § 7410.

<sup>89</sup> Wood, *supra* note 1, at 256.

<sup>90</sup> *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

<sup>91</sup> *Id.* at 57–58.

<sup>92</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1460, 1462 (2007).

remanded to the EPA.<sup>93</sup> In essence, the Court deferred to agency discretion, ignoring the harm being caused to the public trust.

Even more recently, EPA Administrator Stephen L. Johnson denied California's bid to implement its own global warming laws despite support for the laws by leading scientists. Johnson stated that the EPA's decision was due in part to the assertion that global warming is a worldwide problem and requires a nationally led solution, not a state-led solution.<sup>94</sup> However, thirteen states have chosen to adopt California's standards, if approved, and others are considering following.<sup>95</sup> Mary Nichols, chairwoman of the California Air Resources Board, estimated that "[i]f all 50 states adopted California's law, it would reduce the amount of carbon dioxide emissions by 1.4 gigatons, about twice what the federal standards would achieve [by 2009]."<sup>96</sup>

EPA scientists and staff publicly condemned Johnson's decision and alleged that he ignored unanimous staff recommendations to grant California's request.<sup>97</sup> Members of Congress have threatened to subpoena EPA staff reports to uncover whether corruption in the executive branch was to blame for this decision, which was "not supported by the facts, by the law, by the science, or by precedent."<sup>98</sup> Senator Sanders, an Independent from Vermont, said "[t]his administration has

<sup>93</sup> *Id.* at 1463.

<sup>94</sup> Letter from Stephen L. Johnson, Adm'r, EPA, to Arnold Schwarzenegger, Governor, State of Cal. (Dec. 19, 2007), *available at* <http://www.epa.gov/otaq/climate/20071219-slj.pdf>; *see also* Margot Roosevelt, *Boxer Decries 'Outrageous' EPA Emissions Decision*, L.A. TIMES, Jan. 11, 2008, at B3.

<sup>95</sup> ARIZONA PIRG EDUCATION FUND, THE CLEAN CARS PROGRAM 1 (2008), <http://www.arizonapirg.org/issues/clean-cars-for-arizona> (follow "Background on Clean Cars, April 2008" hyperlink under "Resources").

<sup>96</sup> Roosevelt, *supra* note 94.

<sup>97</sup> Letter from Coal. of EPA Labor Unions, Am. Fed'n of Gov't Employees, to Stephen L. Johnson, Adm'r, EPA (Jan. 24, 2008), *available at* [http://www.peer.org/docs/epa/08\\_24\\_1\\_epa\\_union\\_ltr.pdf](http://www.peer.org/docs/epa/08_24_1_epa_union_ltr.pdf); *see also* Press Release, Pub. Employees for Envtl. Responsibility, EPA Scientists Condemn Agency's Greenhouse Gas Waiver Denial (Jan. 24, 2008), *available at* [http://www.peer.org/news/news\\_id.php?row\\_id=978](http://www.peer.org/news/news_id.php?row_id=978).

<sup>98</sup> Press Release, Majority Members of the U.S. Senate Comm. on Env't & Pub. Works, Boxer Statement on California Waiver Decision Documents (Jan. 23, 2008), *available at* <http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases> (browse press releases by "January" and "2008"; then follow "Boxer Statement on California Waiver Decision Documents" hyperlink).

taken the word ‘environment’ out of ‘Environmental Protection Agency.’”<sup>99</sup> Senator Lautenberg, a Democrat from New Jersey, summed it up best: “It’s bad enough when the federal government fails to lead. But it’s even worse when the federal government gets in the way of states that are trying to act in the interest of the public and in the absence of leadership from the EPA.”<sup>100</sup> But what the EPA staff and Congress have failed to notice is that the EPA’s decision is an extreme violation of the trustees’ duty of loyalty to the beneficiaries of the public trust. Such action in a private trust would never be tolerated; it must not be tolerated here.

Through its inaction, the EPA has harmed not only public health and welfare but also an essential component of the public trust. This harm has not gone unnoticed. Recently, the United Nations Intergovernmental Panel on Climate Change, comprised of the world’s leading scientists, issued a warning on climate change. The Secretary-General of the United Nations addressed the panel saying, “only urgent, global action will do.”<sup>101</sup> The report predicted widespread water shortages across the globe, heat waves of increased intensity and duration, and floods caused by rivers and oceans.<sup>102</sup> The report called for a stabilization of carbon emissions, mainly from fossil fuels, by 2015, and noted that although the United States produces the most emissions it remains passive in instituting change.<sup>103</sup> If the United Nations is calling for a global response because of the adverse affects that global warming will have on civilization, it is hard to understand why the EPA has been unable to determine that greenhouse gas emissions are harmful to the public’s health and welfare.

One reason for EPA inaction could be the fact that it is part of the George W. Bush administration. This administration has not

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<sup>99</sup> Richard Simon, *Hearing Grows Warm for EPA Chief*, L.A. TIMES, Jan. 25, 2008, at A13.

<sup>100</sup> *Id.*

<sup>101</sup> Ban Ki-moon, Sec’y-Gen., U.N., Secretary-General’s Address to the IPCC Upon the Release of the Fourth Assessment Synthesis Report (Nov. 17, 2007), available at <http://www.un.org/apps/sgstats.asp?nid=2869>.

<sup>102</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, U.N., CLIMATE CHANGE 2007: SYNTHESIS REPORT 49 (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

<sup>103</sup> *Id.* at 66 n.29.

been overly concerned with environmental issues.<sup>104</sup> Therefore, it is not surprising that the EPA has refrained from citing environmental harms. Consequently, EPA's silence leads to the conclusion that administrators at the EPA are cognizant of the harm being caused by new automobile greenhouse gas emissions but remain silent because of their personal interests and fear of repercussions from political interests. Once again, we see how the presence of political and personal conflicts of interest, present in all branches and levels of government, damages the public trust.

Pursuant to the premise of administrative law, the EPA, as an administrative agency, is supposed to be shielded from politics. Instead, some argue that the EPA insulates politicians from responsibility.<sup>105</sup> In today's political climate, can an administrative agency ever be truly isolated from politics? It is not likely, unless Congress develops a heavy-handed doctrine of administrative autonomy and holds politicians responsible for creating and acting upon conflicts of interest.

## VI TYING IT ALL TOGETHER

So how does all of this fit together? The public trust doctrine is an implied constitutional doctrine that charges the sovereign as trustee with holding natural resources in trust for the protection and preservation of these assets for future generations. As trustee, the sovereign has a duty of loyalty to act only in the best interests of the public as trust beneficiaries. Because the public trust doctrine blankets the entire federal government (and in many states the state government), trustees have a duty to protect the trust against all harm resulting from conflicting federal statutes and actions. This duty includes protection from harms caused presently and in the future by climate change. Unfortunately, the sovereign appears to be generally ignoring its trust duties as evidenced in the ESA and EPA examples and thus breaching its duty of loyalty to trust

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<sup>104</sup> See generally ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE* (2004) (claiming that federal agencies under the George W. Bush administration have handed out permits, among other unprincipled actions, to campaign contributors allowing them to cause environmental harm).

<sup>105</sup> Schoenbrod, *supra* note 70, at 39.

beneficiaries. Consequently, while many people in the United States turn their heads, our trust assets are being mortally harmed and depleted. If we are going to live as healthy and civilized societies in the years to come, we must draw the attention of public trust trustees now, hold them liable for the harm to the public trust resources that they have allowed or have authorized, and make many changes as a government and individuals.

Citizens may no longer sit passively and assume that the sovereign is protecting their natural resources. We must demand more from our elected officials in environmental protection and force immediate changes in environmentally harmful activities. Individual voluntary efforts have proven to be not enough to counteract climate change. Therefore, citizens must rise up and demand government to lead and take action. Without government leadership engaged in forcing change, all other individual efforts will be futile. Because the United States is a leader in carbon emissions, it should lead the fight against climate change and use its strong position to force societal and technological changes. After all, it is government's fundamental duty to provide for the health and welfare of its citizens.

But this leads to the inquiry of how to get the sovereign to pay attention to climate change. First, all branches of government and all levels of government must be engaged in the pursuit of protecting public trust assets from further environmental harms. Therefore, the people need to hold the executive and legislative branches of government, at all levels, responsible for continuing to allow harm to the public trust. We need to be aware of and speak out against public officials who know that their actions will result in harm to trust assets but undertake such actions any way. We must use judicial actions to force trustees to pursue trust interests more aggressively and hold them accountable for statutory violations and abuses of authority.

Second, we must no longer allow conflicts of interest to hide behind the veil of politics or accept these conflicts as just the way politics work. If we continue to allow this political dynamic to occur, government will continue to serve private interests at the expense of the public's interest in public trust assets. This holds true for administrative agencies as well. The public must demand agency autonomy in carrying out agency discretion because, if this is allowed, most administrators may no longer

fear personal losses resulting from doing what is best for the trust. I truly believe that most administrators want to do what they are legislatively charged with doing but do not feel that they can with politics being ever present.

Third, the government must force changes in activities by outlawing and enforcing harmful actions. History tells us this can be accomplished. For instance, Americans supported the bans on asbestos and leaded gasoline once they understood that those substances were detrimental to public health.<sup>106</sup> In the automobile industry alone, technology exists for automobiles that produce less carbon emissions; yet, the EPA, Congress, and the judiciary refuse to mandate that automobile manufacturers move entirely to this technology, citing economic interests and concerns. Ultimately, these government decisions have favored short-term economic benefits over the long-term sustainability of civilization.

Finally, we must hold trustees liable when they breach their public trust duties by diminishing public trust assets. This is the most likely mechanism to attract the government's attention. In a private trust, the threat of personal liability deters and detracts trustees from engaging in decisions and activities that would breach their duty of loyalty. Because no public trust trustee has been held liable for the damage his decisions and actions have caused to the trust, there is no incentive for public officials to choose long-term climate-change-reversing actions over short-term political and economic gains. We must allow the public trust doctrine to trump all other federal actions that threaten the trust assets and hold trustees personally liable for harm they induce or allow to impact the trust assets. In the role of trustee, there is no place for politics, and individuals and governments must demand that politics be set aside when public officials act in their capacity as public trust trustees.

## VII CONCLUSION

Climate change is directly damaging and depleting natural resources that are held in trust under the public trust doctrine. The public trust doctrine saddles the sovereign as trustees with a

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<sup>106</sup> Wood, *supra* note 1, at 251.

duty of loyalty to act only in the best interests of the beneficiaries. However, public officials in all branches and levels of government are breaching this duty by allowing conflicts of interest to influence their decision making. Personal and political conflicts of interest interfere with administrative agency discretion resulting in decisions that ultimately harm trust assets. The impacts of climate change are already being felt and will only worsen. Citizens must force government to address the present and future impacts of climate change and to carry out their duties as trustees of the public trust. The climate change crisis has reached critical levels, and Americans must embrace the public trust if future generations are to exist in a civil environment. We must demand that public officials take off their political hats, put on their public trust trustee hats, and take immediate action. If public officials fail to take responsibility, personal liability should become a reality.

